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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KIMBERLY GALLAHAN,

11 Plaintiff,

12 v.

13 PHILADELPHIA INDEMNITY
14 INSURANCE COMPANY,

15 Defendant.

Case No. C17-131RSM

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING LEAVE TO AMEND

16 This matter comes before the Court on Defendant Philadelphia Indemnity Insurance
17 Company ("Philadelphia")'s Motion for Summary Judgment, Dkt. #14, Philadelphia's Motion
18 to Supplement the Factual Record, Dkt. #20, and Plaintiff Kimberly Gallahan's Motion for
19 Leave to File Amended Complaint, Dkt. #26. Philadelphia argues that Ms. Gallahan's suit is
20 barred by the contractual limitations period of the insurance policy. For the reasons set forth
21 below, the Court agrees, and GRANTS Philadelphia's Motions. Furthermore, the Court
22 DENIES Ms. Gallahan's Motion to Amend given the procedural posture of this case.
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25 **I. BACKGROUND**

26 On February 5, 2012, an auto accident occurred between Ms. Gallahan and the at-fault
27 driver, Dennis Knox. *See* Dkts. #16-2; #16-4 at 3. The vehicle Ms. Gallahan was driving was
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ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND
DENYING LEAVE TO AMEND - 1

1 owned by her employer and insured under Philadelphia's Commercial Lines, Policy No.
2 PHPK766339. Dkt. #16-1.

3 The Policy provides Underinsured Motorist ("UIM") Coverage in an endorsement. *Id.*
4 at 16. This endorsement includes the following provisions:

- 5 a. No one may bring a legal action against us under this Coverage
6 Form until there has been full compliance with all the terms of
7 this Coverage Form.
- 8 b. any legal action against us under this Coverage Form must be
9 brought within one year after the date on which the cause of
action accrues.

10 *Id.* at 18.

11 On July 23, 2012, plaintiff's then-counsel wrote Philadelphia and inquired about UIM
12 coverage. Dkt. #16-2. Philadelphia responded three days later and provided Ms. Gallahan's
13 attorney with the requested information. Dkt. #16-3.

14 On May 27, 2014, Ms. Gallahan, through a new attorney, informed Philadelphia that
15 she had settled her claim against Mr. Knox on July 8, 2013. Dkt. #16-4. On September 29,
16 2014, Ms. Gallahan demanded Philadelphia pay her the full UIM policy limits. Dkt #16-5.
17 Philadelphia investigated Ms. Gallahan's claim, and on November 10, 2015, Philadelphia and
18 Ms. Gallahan participated in an unsuccessful mediation. Dkt. #15 at ¶ 4.

19 Fourteen months later, on January 3, 2017, Ms. Gallahan filed this suit against
20 Philadelphia. Dkt. #1-1. Philadelphia removed to this Court on January 30, 2017. Dkt. #1.

21 II. DISCUSSION

22 A. Motion to Supplement

23 The Court will first address Philadelphia's Motion to Supplement the Factual Record.
24 Dkt. #20. Philadelphia wishes to add to the record an email from Ms. Gallahan's counsel dated
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1 December 11, 2015, one month after the unsuccessful mediation, sent to Philadelphia and
2 stating that she was “about to file with the courts.” Dkt. #21-1 at 2. Philadelphia argues that
3 this evidence is relevant and directly contradicts Ms. Gallahan’s claim that neither she nor her
4 counsel were on notice that plaintiff’s UIM claim had accrued after the mediation. Dkt. #20 at
5 2. Philadelphia argues that the Court has discretion to supplement the record and this
6 supplementation is not unfair or unjust because the email was authored and sent by Ms.
7 Gallahan’s own representative. *Id.* at 4.

9 In Response, Ms. Gallahan argues that “the submission prove[s] nothing of
10 consequence,” and that “Philadelphia offers no valid excuse for its failure to include the e-mail
11 in its original filing or in connection with its reply papers.” Dkt. #23 at 1. Ms. Gallahan argues
12 that there is no authority on point for the kind of relief Philadelphia is requesting. Ms.
13 Gallahan takes the opportunity in briefing to address the evidence on the merits and question its
14 relevance. *Id.* at 2–3.

16 The Court finds that it has discretion to grant the requested relief, and that it is
17 warranted in this case for several reasons. First, to save judicial resources—because the
18 deadline for filing dispositive motions has not passed, Philadelphia would be within its rights to
19 withdraw and refile a more complete dispositive motion containing this evidence. *See* LCR
20 7(l). The Court wishes to avoid that unnecessary effort. Second, because Ms. Gallahan has
21 failed to show undue prejudice for the Court to consider this evidence, and has had an
22 opportunity to respond to the issues raised by the evidence in briefing. Finally, the Court notes
23 that Philadelphia is not engaging in summary-judgment-by-ambush, as the document in
24 question was authored by Ms. Gallahan’s legal representative and should come as no surprise.
25 Given all of the above, the Court will grant this Motion.
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1 **B. Legal Standard for Summary Judgment**

2 Summary judgment is appropriate where “the movant shows that there is no genuine
3 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.
4 R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are
5 those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at
6 248. In ruling on summary judgment, a court does not weigh evidence to determine the truth of
7 the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco,*
8 *Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny &*
9 *Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

10 On a motion for summary judgment, the court views the evidence and draws inferences
11 in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v.*
12 *U.S. Dep’t of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable
13 inferences in favor of the non-moving party. *See O’Melveny & Meyers*, 969 F.2d at 747, *rev’d*
14 *on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a “sufficient
15 showing on an essential element of her case with respect to which she has the burden of proof”
16 to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Further,
17 “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be
18 insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.”
19 *Anderson*, 477 U.S. at 251.

20 **C. Philadelphia’s Motion for Summary Judgment**

21 Philadelphia argues that, under the contractual limitations provision above, Ms.
22 Gallahan had one year from the date Philadelphia refused to pay her UIM claim to bring this
23 action, and that she missed this deadline. Philadelphia calculates the start date as November
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1 10, 2015, the date of the failed mediation between the parties. Dkt. #14 at 1. Philadelphia
2 asserts, supported by a declaration of counsel, that “Ms. Gallahan demanded more in UIM
3 benefits than Philadelphia was willing to pay” at the mediation. Dkt. #14 at 2; Dkt. #15 at 2.

4 In Response, Ms. Gallahan argues that the events of the mediation are not properly
5 before the Court because mediation communications are privileged, and that there is a genuine
6 issue of material fact regarding what occurred at that mediation. Dkt. #17 at 1. Ms. Gallahan
7 admits that the mediation took place, but argues that the discussions at mediation cannot be
8 placed before the Court. In any event, Ms. Gallahan does not *deny* that she participated in the
9 mediation to support her claim for UIM benefits, and that the mediation was unsuccessful
10 because Philadelphia did not agree to pay that claim in full. Ms. Gallahan moves to strike all
11 references to mediation communications. *Id.* at 3. Ms. Gallahan also argues that the
12 contractual limitation clause is void and unenforceable, despite Philadelphia’s citation to *Estate*
13 *of Ingram ex rel. Larsen v. Am. States Ins. Co., infra.* *Id.* at 4–6. Ms. Gallahan cites no
14 authority for her legal challenge to this case law, essentially asking the Court to create new law
15 on this issue. In the alternative, Ms. Gallahan argues that the failed mediation is insufficient
16 evidence for the Court to determine whether Philadelphia “expressed a position on whether or
17 not it would pay the claim” and thus there is no evidence that Philadelphia “breached the
18 agreement as a matter of law on November 10, 2015.” *Id.* at 7. According to Ms. Gallahan,
19 Philadelphia should have sent a letter explicitly denying her claim for the clock to have started
20 on her claim. *Id.* at 8.

21 On Reply, Philadelphia argues, *inter alia*, that it has not violated any mediation
22 privilege because it did not disclose actual mediation communications, it simply stated “the
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1 nonconfidential fact that the mediation did not result in a settlement.” Dkt. #19 at 3 (citing
2 RCW 7.07.010).

3 Policy language requiring suits for UIM benefits be brought “within one year after the
4 date on which the cause of action accrues” does not violate Washington’s underinsured
5 motorist statute. *Estate of Ingram ex rel. Larsen v. American States Ins. Co.*, 44 F.Supp.3d
6 1046 (2014). The statute of limitations for a claim against an insurer based upon UIM
7 coverage begins to run when the alleged breach occurs. *Safeco Insurance Co. v. Barcom*, 112
8 Wn.2d 575, 773 P.2d 56 (1989). The breach occurs when the insurer denies the UIM claim,
9 refuses to honor its obligation under the policy, or pays the insured less than he believes he is
10 entitled. *American States Ins. Co.*, 44 F.Supp.3d at 1050.
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13 As an initial matter, the Court declines to strike Philadelphia’s generic statements about
14 the mediation. Philadelphia has not submitted actual mediation communications, and the
15 outcome of the mediation is not privileged. The fact that the mediation was unsuccessful
16 because Philadelphia refused to agree to Ms. Gallahan’s demands can be easily inferred.
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18 The Court finds no genuine issue of material fact here. The parties agree that a failed
19 mediation took place between them, represented by counsel, on November 10, 2015, more than
20 a year before this action was filed. The parties agree that this mediation was about the UIM
21 claim at issue. This failed mediation did or should have put Ms. Gallahan on notice that
22 Philadelphia had either denied her UIM claim, refused to honor its obligation under the policy,
23 or offered only to pay her less than she believed she was entitled. Accordingly, Philadelphia
24 engaged in the necessary actions for Ms. Gallahan’s cause of action to accrue. *American States*
25 *Ins. Co.*, 44 F.Supp.3d at 1050. The Court’s conclusion is insulated by the December 2015
26 email from Ms. Gallahan’s paralegal to Philadelphia stating that Ms. Gallahan was “about to
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1 file with the courts.” This email conveys that not only *should* Ms. Gallahan have known that
2 her action accrued more than a year prior to filing, she *did* know. Although the Court agrees
3 that Philadelphia would have been wise to send a letter denying Ms. Gallahan’s claim, the
4 Court does not find that such is required in every case, especially in a case such as this where
5 the plaintiff was already represented by counsel.
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7 The Court finds that Philadelphia’s contractual limitation clause is valid and
8 enforceable under existing Washington law. *See Estate of Ingram ex rel. Larsen v. Am. States*
9 *Ins. Co., supra*. The Court declines to follow Ms. Gallahan’s suggested detour from
10 established law, especially in this case where the facts so clearly demonstrate she was aware of
11 her UIM claim for years prior to filing this action. Accordingly, the Court can grant summary
12 judgment in favor of Philadelphia and dismiss all claims in this action.
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14 **D. Motion for Leave to Amend Complaint**

15 On November 22, 2017, after all briefing had been submitted on the dispositive motion
16 above, Ms. Gallahan filed a Motion for Leave to Amend her Complaint to add causes of action
17 for violation of The Insurance Fair Conduct Act (“IFCA”), common law bad faith, and
18 violation of the state Consumer Protections Act (“CPA”). Dkt. #26. Ms. Gallahan argues that
19 she has satisfied Rule 15(a) “as there is no evidence of undue delay, bad faith, or prejudice to
20 the opposing party.” *Id.* at 2. Amazingly, Ms. Gallahan “does not anticipate any deadlines in
21 this case will be disturbed with the amendment to this claim.” *Id.*
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24 Examining the procedural posture of this case, discovery closed two days prior to when
25 this Motion was filed. Dkt. #11. The dispositive motion deadline is December 19, 2017, and
26 trial is set for March 19, 2018. *Id.* The Court finds that Ms. Gallahan’s Motion is untimely.
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1 The Court would not be able to grant this relief without modifying the existing case schedule,¹
2 and Ms. Gallahan has failed to show good cause to do so. *See* Fed. R. Civ. P. 16(b)(4). The
3 Court can think of no reason why Ms. Gallahan could not have included these new claims in
4 her initial Complaint. The Court will not reopen discovery in this case, as this would prejudice
5 Philadelphia with additional expense and delay. Finally, the Court agrees with Philadelphia
6 that Ms. Gallahan has brought this Motion in response to the summary judgment motion, *see*
7 Dkt. #28 at 6, and that this constitutes a bad faith attempt to restart failing litigation. Given all
8 of the above, the Court will deny this Motion.
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10 **III. CONCLUSION**

11 Having reviewed the relevant briefing, the declarations and exhibits attached thereto,
12 and the remainder of the record, the Court hereby finds and ORDERS:
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14 1) Defendant Philadelphia's Motion for Summary Judgment, Dkt. #14, is GRANTED.

15 All of Ms. Gallahan's claims against Philadelphia are dismissed.

16 2) Philadelphia's Motion to Supplement the Factual Record, Dkt. #20, is GRANTED.

17 3) Plaintiff Gallahan's Motion for Leave to File Amended Complaint, Dkt. #26, is
18 DENIED.
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20 4) This case is CLOSED.

21 DATED this 11 day of December, 2017.
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24 RICARDO S. MARTINEZ
25 CHIEF UNITED STATES DISTRICT JUDGE
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27 ¹ To allow amendment without allowing discovery or adequate time to prepare for dispositive motions would
28 clearly prejudice Philadelphia. Although Ms. Gallahan argues that Philadelphia has had notice of Ms. Gallahan's
plan to amend with these claims and has not requested additional discovery, *see* Dkt. #26 at 4, the Court finds that
Philadelphia has not waived its right to conduct discovery on these claims.